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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO VELASQUEZ,

Defendant and Appellant.

D070688

(Super. Ct. No. JCF35718)

APPEAL from an order of the Superior Court of Imperial County, Poli Flores, Jr., Judge. Affirmed as modified and remanded with directions.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

Pedro Velasquez entered a plea of no contest to one count of vehicle theft (Veh. Code, § 10851, subd. (a)). The court placed him on three years' formal probation and

ordered him to pay \$14,092.80 to the vehicle's owner, Christina Ayala. Additionally, the court imposed the following fines and fees: \$40 pursuant to Penal Code¹ section 1465.8, subdivision (a)(1); \$30 pursuant to Government Code section 70373, subdivision (a)(1); \$100 pursuant to section 1203.1b, subdivision (a); \$25 pursuant to section 1203.1b, subdivision (h); \$25 per month pursuant to section 1203.1b, subdivision (a); \$200 for the cost of appointed counsel; \$300 pursuant to section 1202.4, subdivision (b); and \$300 stayed pursuant to section 1202.44. On appeal, Velasquez contends the trial court abused its discretion by ordering as a condition of probation he pay the victim the fair market value of her vehicle. He further contends the court erred to the extent it imposed as conditions of probation the requirement that he pay attorney fees as well as costs for probation supervision and preparation of the probation report. The People concede as to the latter point that the court's order is ambiguous, and we agree. We modify the order to state that those fees and costs are not conditions of Velasquez's probation and direct the court on remand to so amend its orders. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Ivette Ayala borrowed her mother's car to patronize a local bar, but took a cab home at the end of the night. The next morning, after she discovered that the car keys had been taken from her purse and the car was missing, she reported the vehicle stolen.

¹ Statutory references are to the Penal Code unless otherwise specified.

² Because Velasquez entered a plea of no contest, we set out the underlying facts from the probation officer's report. We refer to the victims by their first names for clarity and intend no disrespect.

A highway patrol investigator later discovered that Velasquez had advertised and sold the vehicle in Mexico, claiming to be the rightful owner.

Velasquez was arrested and eventually entered a plea of no contest to one count of unlawful taking of a vehicle without owner consent. The court set a formal restitution hearing. The probation officer recommended that Velasquez be ordered to pay restitution in the amount of \$590.55 to Ivette's mother, Christina, and \$13,502.25 to Christina's insurance provider.³

At the restitution hearing, the People argued that the probation report provided a suitable basis for restitution, but that both the \$590.55 and the \$13,502.25 should be paid to Christina. Both Ivette and Christina testified regarding the circumstances of the insurance company's payment. They explained that after customs had recovered the stolen vehicle, the insurance company gave Christina two options: (1) it would return the vehicle and pay for repairing the damage from the theft; or (2) it would pay the value of the vehicle in its current damaged condition to Christina. Christina chose the second option because she was scared and stressed about the possibility that the car had been

³ The probation officer's report states in part: "In this case several direct and indirect victims were affected. The owner of the car was left without a car and still had to make payments to the bank. The buyer of the stolen car suffered a loss of \$2,000[] in Mexico and the insurance company who had to pay the bank and the policy holder for the theft. Attached is a copy of payment history in which [it] indicates that the victim made two monthly car payments before the insurance and bank settled. The victim paid a total of \$590.55 for the two months. Also attached is a vehicle valuation report that indicates a settlement value of \$13,367.25. However, the undersigned spoke to Matthew Leonard, the claims examiner for Anchor General Insurance Company. Mr. Leonard advised that the insurance company had paid the [sic] Wells Fargo, \$5,660.20 and the policy holder \$7,842.05 for a total of \$13,502.25. Probation will recommend that the defendant be made responsible to pay restitution through probation." (Some capitalization omitted.)

used for smuggling drugs and she had never been in trouble with police before. She travelled to Mexicali and "didn't want to have problems crossing the border . . . with the car." After the insurance company assessed the value of the vehicle, it paid the lienholder the balance owed on the loan (\$5,660.20), and paid Christina the remainder of the assessed value of the vehicle (\$7,842.05).

Defense counsel took the position that Christina was only entitled to her out-of-pocket costs, and stipulated to a \$590.55 restitution award, but not an award for the vehicle's fair market value. He maintained that under the specific language of section 1202.4, subdivision (f)(2), the victim was entitled to compensation for damages, but the insurance company's offer to return or pay the vehicle's worth had "nothing to do with the damages" and there was no proof as to the extent of damage to the vehicle. Thus, counsel argued, Christina had been compensated and was free and clear of her loan, and because she was made whole, section 1202.4, subdivision (f)(2) did not apply. He suggested that the only way to make Christina whole would have been for her to receive the vehicle and assess the damage, but because Christina made an "independent decision" to receive the car's value, awarding her approximately \$13,000 in restitution would result in double compensation. The People responded that it was Christina's prerogative to decide to take payment for the car's value, which was a reasonable decision for her peace of mind. The prosecutor pointed out that when an insurer pays a victim for a stolen item and obtains restitution in that amount, the victim is properly double paid and left to settle with the insurance company in a civil matter. She also pointed out the money did not make

Christina whole as she only had \$5,000 left on her loan for her car purchased for \$19,000 but now had to purchase a new car and restart loan payments.

Based on the probation officer's report and Christina's and Ivette's testimony, the court awarded the recommended \$14,092.80 in restitution to Christina. It proceeded to impose other probation terms and conditions, and ordered Velasquez to pay various fees, fines and costs, including \$200 for the cost of the court-appointed counsel, the cost of probation supervision, and a \$100 administrative fee for preparation of the probation report. After ordering the fees, fines and costs, the court asked Velasquez if he understood "the terms of probation," to which Velasquez responded, "Yes."

DISCUSSION

I. *Restitution Order*

A. *Legal Principles*

"[T]he primary purpose of mandatory restitution . . . is reimbursement for the economic loss and disruption caused to a crime victim by the defendant's criminal conduct." (*People v. Runyan* (2012) 54 Cal.4th 849, 865.) "Section 1202.4 governs a trial court's authority to order a criminal defendant to pay restitution directly to a crime victim. Section 1202.4, subdivision (a)(1) states: '[i]t is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.' " (*People v. Fulton* (2003) 109 Cal.App.4th 876, 882.) Section 1202.4, subdivision (f), provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the

victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. . . . [¶] (2) Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of a third party. . . . [¶] (3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to . . . : [¶] (A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible."

A victim's right to restitution must be broadly and liberally construed to uphold the voters' intent. (*People v. Riddles* (2017) 9 Cal.App.5th 1248, 1252; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1215.) This broad interpretation extends to the phrase "economic loss" in section 1202.4. (*In re Alexander A.* (2011) 192 Cal.App.4th 847, 854, fn. 4.) " ' ' ' 'Because the statute uses the language "including, but not limited to" these enumerated losses, a trial court may compensate a victim for any economic loss which is proved to be the direct result of the defendant's criminal behavior, even if not specifically enumerated in the statute.' [Citation.]" [Citation.] "The only limitation the Legislature

placed on victim restitution is that the loss must be an 'economic loss incurred as the result of the defendant's criminal conduct.' " " " (*People v. Garcia*, at p. 1215.)

Here, the trial court ordered restitution as a condition of Velasquez's probation, giving it even broader discretion in making its order. "In both sections 1203.1 and 1202.4, restitution serves the purposes of both criminal rehabilitation and victim compensation. . . . When section 1203.1 provides the court with discretion to achieve a defendant's reformation, its ambit is necessarily broader [than under section 1202.4], allowing a sentencing court the flexibility to encourage a defendant's reformation as the circumstances of his or her case require." (*People v. Anderson* (2010) 50 Cal.4th 19, 29; see *People v. Giordano* (2007) 42 Cal.4th 644, 653 ["Penal Code section 1202.4 now requires restitution in every case, without respect to whether probation is granted. In addition, . . . section 1203.1, subdivision (j) provides broader discretion for trial courts to impose restitution as a condition of probation]; *People v. Martinez* (May 25, 2017, S219970) ___ Cal.5th ___ [2017 WL 2288995]; § 1203.1, subd. (j) ["the court may impose upon probationers 'reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer' "].) Thus, as the California Supreme Court recently reaffirmed in *People v. Martinez*, the court's discretion when dealing with conditions of probation includes the power to order restitution " 'even when the loss was not necessarily caused by the criminal conduct underlying the conviction,' including in cases in which 'the loss was caused by related

conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation].'" (*People v. Martinez*, ___ Cal.5th at p. ___ [2017 WL 2288995], quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

B. *Standards of Review*

"[W]e review the trial court's restitution order for abuse of discretion." (*People v. Giordano, supra*, 42 Cal.4th at p. 663.) The abuse of discretion standard " 'asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citation].' [Citation.]. Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the . . . victim's economic loss." (*Id.* at pp. 663-664.) The amount need not be limited to the exact amount of loss or the amount that might be recoverable in a civil action. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121; see also *People v. Ortiz* (1997) 53 Cal.App.4th 791, 800 [while the amount of restitution cannot be arbitrary or capricious, there is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action].) " ' ' ' "When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' ' ' ' " (*People v. Riddles, supra*, 9 Cal.App.5th at p. 1252, quoting *People v. Baker* (2005) 126 Cal.App.4th 463, 465.)

"In reviewing the sufficiency of the evidence [to support a factual finding], the ' "power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.] Further, the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. [Citation.] 'If the circumstances reasonably justify the [trial court's] findings,' the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact." (*People v. Baker, supra*, 126 Cal.App.4th at pp. 468-469.)

Additionally, "[a]s a practical matter, an appellate court's consideration of a claim that a trial court abused its discretion in awarding restitution because the lower court applied an incorrect legal standard is tantamount to independent or de novo review. As one court has observed, 'when the propriety of a restitution order turns on the interpretation of a statute, a question of law is raised, which is subject to de novo review on appeal.' [Citation.] To be precise, applying a statute or decisional rule to factual determinations about restitution amounts involves considering a mixed question of law and fact that is predominantly legal, requiring independent review." (*People v. Brunette* (2011) 194 Cal.App.4th 268, 276-277; see also *People v. McCarthy* (2016) 244 Cal.App.4th 1096, 1104 [reviewing de novo arguments concerning interpretation of section 1202.4, subdivision (f)(3)(F)].)

C. The Court Did Not Err by Awarding Christina the Fair Market Value of Her Vehicle as an Economic Loss

Velasquez contends the court abused its discretion by ordering as a condition of probation that he pay Christina the fair market value of the stolen vehicle. He advances several differing reasons. He argues that under these circumstances, where the vehicle was recovered and the victim's family was given the choice to sell the vehicle to the insurance company without getting a repair estimate, there is no rational basis on which the court found the Ayalas were entitled to the fair market value of the vehicle or that the sum of \$13,502.25 represented an economic loss.⁴ According to Velasquez, section 1202.4 describes how to value "stolen and recovered property" and limits Christina's recovery to "the actual cost of repairing the property when repair is possible." He points out the court did not determine whether repair was possible, and characterizes the restitution award instead as the result of a voluntary choice or a "collateral sale" between Christina and her insurance company, which did not result in any economic injury, making the award an improper windfall. Velasquez further suggests the evidence concerning Christina's fear of accepting the vehicle renders the court's award a reimbursement for noneconomic loss.

We reject Velasquez's suggestion that the court was required to determine that repair was possible or order the actual cost of repair of Christina's stolen vehicle as

⁴ We note that Velasquez refers only to Ivette as the "victim." To the extent he intends to suggest Christina is not also a victim entitled to restitution, he is incorrect. Christina was the vehicle's owner. Additionally, subdivision (k) of section 1202.4 defines "victim" as including the "immediate surviving family of the actual victim." (§ 1202.4, subd. (k)(1); see *People v. Crisler* (2008) 165 Cal.App.4th 1503, 1507-1508.)

restitution under section 1202.4, subdivision (f)(3)(A). The statute entitles the victim to "[f]ull or partial payment for the value of stolen or damaged property," which is "the replacement cost of like property, *or* the actual cost of repairing the property when repair is possible." (Italics added.) The California Supreme Court has pointed out that section 1202.4, subdivision (f)(3)(A) is "devoid of language stating that a trial court's restitution award should be limited to the *lesser* of the 'replacement cost' of the victim's damaged property or 'the actual cost of repairing the property when repair is possible.' " (*People v. Stanley* (2012) 54 Cal.4th 734, 738.) Rather, "[t]he statute leaves the choice to the trial court." (*Ibid.*) Thus, the trial court was not compelled to award the lesser amount of repair or replacement, but rather, was to award what it deemed to be Christina's actual economic loss as a result of Velasquez's crime. Notably, Velasquez does not dispute the insurance company's determination that \$13,502.25 constituted the value of the stolen vehicle.⁵

⁵ The amount of the reimbursed loss was a matter between Christina and her insurance company, and we will not second guess the unrebutted testimony that the insurer had determined Christina's loss to be \$13,502.25. We note also that the trial court in making its restitution award ordered the probation department to notify Christina's insurer to give it an opportunity to pursue any remedy to recover that indemnification: "I don't know if there's an assignment clause or provision in their insurance, but as . . . pointed out in [*People v. Garcia, supra*, 185 Cal.App.4th 1203], Anchor General would have theoretically some recourse civilly to get back some of that restitution if it's . . . given to the victim. But that's up to Anchor." This is consistent with the California Supreme Court's holding in *People v. Birkett* (1999) 21 Cal.4th 226: "It appears clear from [now section 1202.4, subdivision (f)] that the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his crime had caused*, and that such reparation should go entirely to *the individual* . . . , regardless of that victim's reimbursement from other sources. . . . [¶] Thus, . . . the immediate victim was entitled to receive from the probationer the full

That Christina chose to accept the value of her vehicle rather than agree to its repair and return does not invalidate the court's determination that she suffered an economic loss—the loss of her car—as a result of Velasquez's crime. Contrary to Velasquez's characterization of the circumstances as a voluntary or "collateral" sale, the trial court was entitled to conclude on the testimony before it that Christina made a stolen vehicle claim with her insurer, and the insurance company fulfilled its contractual obligation to pay on the claim. Velasquez's argument that Christina did not suffer economic loss under those circumstances but obtained a "windfall" fails to recognize the settled rule that direct victim of crimes should recover the full amount of their losses caused by the defendant's crime without regard to the full or partial recoupment from other sources. (See *People v. Birkett*, *supra*, 21 Cal.4th at p. 246; *People v. Baker*, *supra*, 126 Cal.App.4th at p. 468 [finding restitution appropriate even where victims' stolen property (cattle) was returned to the victims, as the cattle were no longer "the 'same' " since they had been bred and were older; the fact the victims sold the cattle did not affect the amount of restitution the court could award]; *People v. Hove* (1999) 76 Cal.App.4th 1266, 1270-1271.) The circumstances here are nothing like *People v. Chappelone* (2010) 183 Cal.App.4th 1159, relied upon by Velasquez, in which the appellate court reversed as

amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses. Third parties . . . such as private insurers, who had already reimbursed the victim were thus left to their separate civil remedies, if any, to recover any such prior indemnification either from the victim or from the probationer." (*Id.* at p. 246; see also *Garcia*, *supra*, 185 Cal.App.4th at p. 1216 [trial court was required to order full restitution regardless of whether insurance covered a portion of the victim's losses].)

a windfall a trial court's restitution award to a department store of the retail value of stolen property, which the trial court also ordered returned to the store. (*Id.* at p. 1185.) Here, Christina did not recover her vehicle, but received a payment from her insurer of its value in damaged condition. It was not a windfall award, but an award calculated to make her whole for her vehicle's loss.

Nor do we accept Velasquez's argument that Christina's decision to forego return of her vehicle out of fear transforms the award into "noneconomic" damages. We rejected a similar argument in *In re Alexander A.*, a juvenile restitution case in which the defendant was ordered to pay \$8,219.18 in restitution after vandalizing a Honda Accord vehicle with a replacement value of about \$5,300.⁶ (*In re Alexander A.*, *supra*, 192 Cal.App.4th at p. 851.) There the victim asked the court to order the defendant to pay the full cost of repairing the car because he wanted to keep it, even though the defendant presented evidence that the price of a similar car in excellent or good condition was much less. (*Ibid.*) In ordering restitution, the court found the award was reasonable because the victim should not have to look for a similar vehicle in "precrime" condition. (*Id.* at

⁶ We pointed out that Welfare and Institutions Code section 730.6, subdivision (a)(1), the governing restitution provision in *In re Alexander A.*, contained identical language to Penal Code section 1202.4, subdivision (f)(3)(A), which governs here. (*In re Alexander A.*, *supra*, 192 Cal.App.4th at p. 853, fn. 3.) Additionally, the provision governing restitution for stolen or damaged property in juvenile cases similarly sets the measure of damages at " '[f]ull or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible.' " (*Ibid.*) Likewise, the provisions applicable to restitution in *Alexander A.* did not authorize direct restitution for noneconomic losses. (*Id.* at p. 854.)

p. 852.) It also found the order was "rehabilitative and taught [the defendant] there were consequences to his behavior." (*Ibid.*)

On the defendant's appeal, this court affirmed, finding the record established a factual and rational basis for the court's restitution order. (*In re Alexander A.*, *supra*, 192 Cal.App.4th at pp. 856-857.) We reasoned that restitution must be reasonably calculated to not only make the victim whole, but also to rehabilitate the minor and deter future criminal behavior. (*Id.* at p. 856.) We rejected the minor's argument that the restitution order amounted to reimbursement for "intangible or esoteric losses," or an "unmeasured" loss, making it arbitrary and capricious. (*Id.* at pp. 856-857.) We pointed out that the court instead "ordered Alexander to pay for the costs of repairing the extensive and deliberate damage he caused to the victim's car." (*Id.* at p. 858.) "Choosing repair over replacement is not intended to reimburse the victim for noneconomic injury but acknowledges the practicalities involved in cleaning up after a crime spree. The victim is entitled to a resolution." (*Id.* at p. 857.) Underlying our conclusion was the notion that when the juvenile justice system goals are met, "in selecting the measure of restitution the court may consider the impact of its restitution order on the victim." (*Id.* at p. 857.) And in providing the victim relief from his injury, the court could consider the impact of alternative restitution orders on the victim as long as the order itself was consistent with the juvenile justice goals of compensation for economic loss, rehabilitation and deterrence. (*Ibid.*) In the circumstances of *Alexander A.*, we explained: "In determining the basis for the restitution order, the court clarified that [the victim] wanted to repair the Accord. In view of the extent of Alexander's vandalism, the court reasonably concluded

that ordering Alexander to repair the car served a rehabilitative purpose. After defacing a three-wall school mural, Alexander and his companion spray-painted graffiti on the Accord, painted its rims and license plate, destroyed the windshield, broke the right rearview mirror, kicked out the front signal lights, dented the vehicle's hood and the roof and damaged the left side of the car. The car could not be driven after it was vandalized. The court determined that repairing the vehicle would help Alexander understand there were consequences for his actions." (*Id.* at p. 858.) We concluded that a court does not order impermissible noneconomic loss when the restitution order is an "'effective rehabilitative penalty . . . [that] forces the defendant to confront . . . the harms his actions have caused.'" (*Id.* at p. 858.)

These same principles apply in this case. (*People v. Martinez, supra*, __ Cal.5th at p. __ [2017 WL 2288995] ["[I]n granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety,' including the power to 'regulate conduct 'not itself criminal' ' but ' "reasonably related to the crime of which the defendant was convicted or to future criminality" ' "]; *People v. Anderson, supra*, 50 Cal.4th at p. 29; *People v. Carbajal, supra*, 10 Cal.4th at pp. 1120-1121; *People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1133 ["In addition to compensating the victim, a restitution order is intended to rehabilitate the defendant and to deter the defendant and others from future crimes"]; *People v. Moloy* (2000) 84 Cal.App.4th 257, 261 [restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused].) Here, Velasquez pleaded no contest to stealing the vehicle, which he took across the border and sold to a third

party in Mexico. Due to these actions, Christina could not accept return of the car in its condition in view of potential problems in the future with crossing the border in that particular vehicle. She testified, "I didn't want the car because I was scared, maybe they had smuggled drugs in it or something and I would have problems because I go to Mexicali and I didn't want to have any problems when I cross the border." The trial court had a rational and factual basis for awarding the fair market value of the vehicle having considered the impact of Velasquez's crime on Christina, and the fact she was deprived of a useful vehicle after she elected not to accept its return. The court's award was not reimbursement for impermissible noneconomic damages but restitution for the consequences of Velasquez's crime, and the award served a rehabilitative purpose in connection with the harm he caused. As we stated in *Alexander A.*, there may be some point at which the costs to replace stolen property so exceed its repair costs that a restitution order for replacement costs may no longer be rational in that it results in a windfall to the victim or does not serve a rehabilitative purpose. (*In re Alexander A.*, *supra*, 192 Cal.App.4th at p. 858.) But here, in view of the taint Christina felt as a result of the crime and the fact she would be required to purchase a similar car in an acceptable condition to take across the border without potential adverse consequences, we are not persuaded the court's restitution award constitutes an impermissible noneconomic award, a windfall, or an abuse of discretion.

D. *Claim of Erroneous Finding of Law*

Velasquez further contends that the trial court made an erroneous finding of law in awarding Christina the fair market value of the vehicle in reliance on section 1202.4, subdivision (f)(2), which provides in part that the "[d]etermination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of a third party." He maintains that the plain language of that statute—apparently the phrase "indemnification . . . rights"—did not permit the court to make its award because Christina "was not indemnified for her losses by the insurance company [but] simply sold the car to the company as-is for the fair market value before assessing the damages and submitting an indemnification claim for the damages."

We reject Velasquez's argument on its premise, which mischaracterizes the record. As we have stated, the probation officer reported, and trial court reasonably concluded, that Christina was indemnified by her insurer for the loss of her vehicle after submitting a stolen vehicle claim. " 'Indemnity may be defined as the obligation resting on one party to make good a loss or damage another party has incurred.' [Citation.] Civil Code section 2772 defines 'indemnity' as 'a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.' " (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1023, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628.) And, the court properly determined Christina suffered an "economic loss" within the broad meaning of that term as a result of Velasquez's crime: the loss of a vehicle useful to her for travelling to and

from Mexicali. Thus, as a matter of law it did not err when it relied upon section 1202.4, subdivision (f)(2) to conclude Christina's reimbursement by her insurance company would not affect its restitution award. (*People v. Birkett*, *supra*, 21 Cal.4th at p. 246; *People v. Garcia*, *supra*, 185 Cal.App.4th at p. 1216.)

II. *Payment of Probation Supervision Costs, Probation Report Costs and Attorney Fees as Conditions of Probation*

Asserting that both the court's oral pronouncement and its minute order are ambiguous as to imposition of the terms and conditions of probation, Velasquez contends the court erred "[t]o the extent the record can be interpreted as stating that defendant's success or failure on probation is conditioned upon payment of the probation supervision costs, the probation report costs or attorneys' fees" He asserts that such items cannot be made conditions of successful completion of probation. Velasquez asks us to order the trial court to modify its minute order to indicate those items are not probation conditions. The People concede that while the court did not explicitly designate attorney fees, the costs of probation, and the cost of the probation report as conditions of probation, the record is ambiguous, and such conditions would be improper. We agree that Velasquez's payment of attorney fees, the costs of probation supervision and the administrative fee for preparing the probation report cannot be made conditions of successful completion of probation. (*People v. Flores* (2003) 30 Cal.4th 1059, 1067, fn. 5; *People v. Bradus* (2007) 149 Cal.App.4th 636, 642.)

DISPOSITION

The order is modified to state that its provisions that Velasquez shall pay attorney fees, the costs of probation supervision and the administrative fee for preparing the probation report are not conditions of Velasquez's probation, and the matter remanded to the trial court with directions to amend the minutes and the probation order accordingly.

In all other respects the order is affirmed.

O'ROURKE, J.

I CONCUR:

McCONNELL, P. J.

DATO, J., Dissenting.

The outline of this case is simple and straightforward. The defendant stole a car. The car was recovered, albeit with some damage. Everyone agrees the victim is entitled to restitution to compensate for any economic loss suffered as a result of the defendant's conduct. The question is how to measure the amount of restitution?

The trial court has broad discretion to decide how best to value the economic loss suffered by a victim. It could be measured by the diminution in value of the vehicle (i.e., the fair market value of the car before the theft less the fair market value after) and, if the cost of repair exceeded the fair market value before the theft (i.e., the car was totaled), the court could decide to award the full pre-theft value of the car. It could alternatively have been measured by the cost to repair the vehicle, even if it exceeded the value of the vehicle before the theft. (*In re Alexander A.* (2011) 192 Cal.App.4th 847, 857; cf. *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687-688 [while cost of repair generally limited by diminution of value, exceptions are recognized].) All of these are reasonable ways to gauge the victim's loss.

In this case, however, the trial court chose none of these options. Instead, it was distracted by an irrelevant event that occurred after the defendant's arrest and the recovery of the car, when the victim's insurance company agreed to buy the vehicle from the victim in exchange for its fair market value *after the theft*, i.e., in its damaged condition. The Probation Department suggested and the court accepted the view that this after-theft value—\$13,502.25—was somehow a proper measure of what the victim lost.

Whether the victim has insurance should be irrelevant to the calculation of restitution. Restitution is designed to compensate for economic loss caused as the result of the defendant's conduct. (*People v. Millard* (2009) 175 Cal.App.4th 7, 38-40.) The fact that insurance may cover the same loss does not *diminish* the amount of the loss for which the defendant may be liable (*People v. Birkett* (1999) 21 Cal.4th 226, 246), but neither should it *increase* it. The victim is still entitled to restitution measured in the same way, subject only to whatever contractual subrogation rights the insurer may have. (*Id.* at pp. 246-247 & fn. 19.)

This is not a case where the vehicle was totaled such that the fair market value *before* the theft is a reasonable measure of the loss. In that type of case it would be appropriate to award the *pre-theft* value as restitution, leaving it to the insurer to recover from the victim any prior indemnification the victim received. (*People v. Birkett, supra*, 21 Cal.4th at p. 246.) Here, however, the trial court relied on the *post-theft* value of the recovered vehicle. Whatever it is, post-theft value does not measure the loss to the victim caused by the defendant's criminal conduct. To the contrary, the post-theft value of the property recovered should, if anything, *mitigate* the victim's claimed economic loss because recovered property is the antithesis of lost property.

The record does not reveal anything about the extent of the damage to the car. Assume for the sake of argument it was minimal—a scrape that would have cost \$500 to repair. How could it be legitimately argued that the victim's economic loss was more than \$13,500?

The majority attempts to suggest this figure represents what the victim (Christina) and her insurer agreed was the value of her loss and is sufficient proof in the absence of other evidence. (Maj. opn., *ante*, at pp. 11-12, fn. 5.) That might be the case had the insurer totaled the vehicle and offered Christina the *pre-theft* value or, in the alternative, the cost of repair. But that is not what happened. For unknown reasons the insurer offered to restore Christina's car to its pre-theft condition or buy it from her for its then-current (post-theft) fair market value. Christina opted for the latter. This is no different than if Christina had settled with the insurance company for the cost of repair, pocketed the settlement check, then sold the damaged vehicle to someone else. The measure of her economic loss would be the cost of repair, not the sales price. Likewise here, although several other measures would have been proper, the post-theft value of the vehicle is not a reasonable measure of Christina's economic loss.¹

DATO, J.

¹ The citation to the California Supreme Court's recent decision in *People v. Martinez* (May 25, 2017, S219970) ___ Cal.5th ___ [2017 WL 2288995] does not aid the analysis. *Martinez* merely restates the accepted proposition that where restitution is imposed as a condition of probation, the trial court has broader discretion to require payment of losses not directly caused by the criminal conduct of which defendant was convicted. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) The issue here is not the extent of the connection between the defendant's conduct and the victim's loss. The question is how the post-theft value of a vehicle returned to the victim's representative can in any way be classified as a *loss*?